BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MAUDINE J. MINGLE	)	
Claimant	)	
	)	
VS.	)	
	)	
THE MANOR[1]	)	
Respondent	)	Docket No. 1,047,647
	)	
AND	)	
	)	
MIDWEST INSURANCE COMPANY, INC.	)	
Insurance Carrier	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

The Workers Compensation Fund (Fund) requests review of the December 10, 2009 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) found the claimant was injured out of and in the course of her employment with respondent on June 13, 2009 and was diagnosed with a meniscus tear. Dr. Chris C. Eckland was authorized to be claimant's treating physician, all medical treatment and temporary total disability (TTD) benefits were ordered to be paid. All benefits were assessed against the Fund.

The Fund has appealed this Order contending that the ALJ erred in assessing the benefits against the Fund. The Fund argues first, that there is no explicit finding within the Order that respondent is unable to pay the benefits due to claimant under the Kansas Workers Compensation Act (Act). And without such a finding, there is no basis for assessing costs to the Fund. Second, the Fund argues that claimant sustained a

[1] Also known as Clearwater Retirement, Inc.

subsequent injury during a period when there was coverage available and that it is more likely than not that claimant's present need for medical treatment and TTD benefits is due to that subsequent injury. And that the ALJ erred in concluding that any benefits that might be due are attributable to claimant's original injury.

Claimant has not filed a brief in this matter, but would presumably ask that the ALJ's Order be upheld.

The respondent[2] and its carrier, through the various attorneys, contend there is no jurisdiction to hear this appeal and that it should be summarily dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Although there are a number of attorneys and parties involved in this litigation, the facts surrounding the underlying claim are largely undisputed.

There is no dispute that claimant injured her right knee in the scope and course of her employment for respondent on June 13, 2009. That claim is, by all accounts, compensable. Claimant was immediately treated for her right knee complaints and referred to an orthopaedist, Dr. Eckland. Although she apparently continued to work her normal duties[3], the physician's note indicates she was to perform only light duty as of June 24, 2009 and to avoid prolonged standing or walking.[4] She was directed to have physical therapy but failing improvement, an MRI was to be done.[5]

It is equally undisputed that as of June 13, 2009, respondent was uninsured and carried no workers compensation coverage as required by the Act. The policy was reinstated effective June 30, 2009, but between June 5 and June 29, 2009 respondent was uninsured.

On July 4, 2009, claimant was again working but experienced a "locking" of her knee while helping a patient. Claimant did not initially remember this incident and even when

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[2] Respondent appears through its own attorney and also by and through an attorney retained by its insurance carrier. As explained in the Order, there is a period of time (from June 13, to June 29, 2009) that respondent was uninsured due to a policy cancellation.

[3] P.H. Trans. at 38.

[4] *Id.*, Cl. Ex. 1 at 23 (Dr. Eckland's June 24, 2009 Work status report).

[5] *Id.*, Cl. Ex. 1 at 15 (Dr. Eckland's June 24, 2009 Encounter report).

her memory was refreshed, she did not seem to believe it to be a significant event, at least during the preliminary hearing. She returned to Dr. Eckland on July 10, 2009 and told him about the event on July 4. He again recommended the MRI and scheduled her for a followup visit following that test. The MRI revealed a tear in the lateral meniscus along with defect in the lateral patellar retinaculum. Dr. Eckland again suggested physical therapy, and took her off work altogether but indicated in his report that she could work but only in a seated capacity. His report also indicates that surgery was again a possibility if she did not improve. Claimant did not improve and, on August 17, 2009, Dr. Eckland concluded that surgery was necessary. Unfortunately, claimant was working on August 22, 2009 and fell once again, slipping in urine, and sustaining injury to her right knee, wrist and neck. Surgery was done on August 25, 2009.

Although respondent has apparently paid some benefits, claimant now requires ongoing therapy to recover from her surgery as well as TTD benefits for the period she is unable to work. But, due to the gap in coverage, a dispute arose between the respondent, its carriers and Fund as to who should be responsible.

A preliminary hearing was held and during the course of that hearing, it became clear that none of the litigants dispute the underlying compensability of any of the events described by claimant. The dispute stems from the fact that there is a period for which respondent has no workers compensation coverage. And based on the possibility that there are more than one dates of accident and the absence of coverage, there is an incentive for those defending this claim to attempt to shift the liability. As noted by the Fund's attorney, the issue is framed this way -

> MR. CUNNINGHAM: No, Your Honor, I don't believe there is a dispute as to whether the claimant suffered an accidental injury. It's whether the subsequent treatment is caused by one, both, or neither of the injuries.[6]

After considering the parties' arguments, the ALJ issued an Order directing the Fund to pay the benefits claimant was requesting. The briefs to the Board reaffirm the parties' arguments made at the preliminary hearing. No one disputes the compensability of the events claimant has described. Nevertheless, the Fund takes issue with the lack of specificity within the Order as to respondent's inability to pay. In other words, if there is no finding that respondent cannot pay the benefits owed, there is no basis upon which to assess those benefits against the Fund.

The Fund also contends it should not be made to pay for treatment that is not causally connected to the June 13, 2009 accident. Rather, the treatment claimant ultimately received, in the form of surgery and physical therapy, are due to claimant's

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[6] *Id.* at 6.

compensable injury of July 4, 2009, a period during which respondent had coverage. Thus, the ALJ erred in assessing liability against the Fund.

At the outset, the question of whether the Board has jurisdiction over this dispute must be addressed. Not every issue is appealable from a preliminary hearing Order. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction[7] or those preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.[8]

Respondent, both by its own private counsel and that retained by its insurer, argue that the Board has no jurisdiction to hear this matter. In support of this contention, they reference the Board's earlier opinion in *Payne*[9]. That case presents a remarkably similar set of facts in that, the date of accident was hotly contested but the underlying compensability of the accident was never disputed. In denying that the Board had jurisdiction to consider the issues decided by the ALJ following a preliminary hearing, the following observations and findings were made:

> The public policy of the State is that workers compensation awards shall be promptly paid.[10] Preliminary hearings are not intended to be a forum to resolve disputes between insurance carriers concerning their respective liabilities.[11] That is why the Board has held, and continues to hold, that where the compensability of a claim is not at issue, a determination of a date of accident is not a jurisdictional issue when raised solely to assign liability as between multiple insurance carriers. The same applies when it is the Fund that seeks to have liability shifted away from a time period when respondent was uninsured to a date when an insurance carrier was on the risk. Although an ALJ is not required to apportion liability, the ALJ has the jurisdiction to do so.[12] It may have constituted error for the ALJ to assign liability to the Fund without first making a determination that the respondent had no insurance and is financially unable to pay the ordered compensation to claimant, but

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[7] K.S.A. 2008 Supp. 44-551.

[8] *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

[9] *Payne v. Copp Transportation*, No 268,622, 2007 WL 1041038 (Kan. WCAB Mar. 8, 2007).

[10] *Acosta v. National Beef Packing Co.*, 273 Kan. 385, Syl. ¶ 11, 44 P.3d 330 (2002).

[11] *Tull v. Atchison Leather, Inc.*, 37 Kan. App. 2d 87, 150 P.3d316 (2007).

[12] *Helms v. Tollie Freightways, Inc.,* 20 Kan. App. 2d 548, 889 P.2d 1151 (1995).

> such an omission does not render the order invalid or subject to an appeal at this stage of the proceedings. As counsel are aware, the Board has stated on numerous occasions that its jurisdiction to hear appeals from preliminary hearing orders is limited.[13]

As in *Payne*, the Fund contends the ALJ erred in assessing liability against the Fund without a specific finding as to insolvency. And as in *Payne*, the Board has no jurisdiction to consider that issue at this juncture of the claim. Accordingly, that aspect of the Fund's appeal is dismissed.

The more difficult aspect of the Fund's appeal is the assertion that the ALJ erred when he ordered the Fund to pay for the medical treatment and TTD benefits which the Fund contends are causally related to claimant's July 4, 2009 accident. This argument arguably gives rise to jurisdiction, in that it seems to touch upon the question of whether the present need for treatment relates to a given accident. In other words, claimant's need for treatment did not arise out of and in the course of the June 13, 2009 accident but rather the July 4, 2009 accident. And this would be the Fund's burden to establish this fact. This argument is clearly intended to avoid the implications of *Payne* and invoke the Board's jurisdiction all in the hopes of shifting liability to respondent's carrier.

After careful consideration of the entire record, this Board Member concludes that there is no jurisdiction to consider the Fund's appeal. As noted in *Payne*, the goal of the Act is to facilitate prompt resolution of claims, particularly those, as here, where compensability is not in dispute. This is not the forum for disputes as to insurance coverage and while the Fund's argument is framed as one rooted in compensability, in reality it is not. The compensability is not in dispute - merely the liability for the benefits to be paid.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[14] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[15]

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Fund's Appeal of the Order of Administrative Law Judge John D. Clark dated December 10, 2009, is dismissed.

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[13] *Payne v. Copp Transportation*, No 268,622, 2007 WL 1041038 (Kan. WCAB Mar. 8, 2007) at 4.

[14] K.S.A. 44-534a.

[15] K.S.A. 2008 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this _____ day of February, 2010.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: James R. Roth, Attorney for Claimant
John C. Nodgaard, Attorney for Respondent and Midwest Ins. Co.[16]
Larry G. Karns, Attorney for Midwest Ins. Co.
Gary K. Jones, Attorney for Respondent-Clearwater Retirement
Kendall, Cunningham, Attorney for the Fund
John D. Clark, Administrative Law Judge

[16] Mr. Nodgaard was hired to represent respondent and its insurance carrier for the coverage period commencing June 30, 2009 and forward. Mr. Nodgaard defers to Mr. Karns and Mr. Jones' arguments regarding this appeal.